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### AN EXCEPTION TO THE RULE THAT A FEDERAL COURT CANNOT ACQUIRE JURISDICTION IN PERSONAM BY WAIVER.

We discussed in 72 Cent. L. J. 281, in an incidental way, the nature of jurisdiction in a federal circuit court as regards the question of mandamus being or not, the appropriate remedy to review a refusal, if erroneous, to remand a cause removed from a state court. The occasion for this discussion lay in the effort of Chief Justice White, speaking for an unanimous court, in the case of *Ex parte Harding*, 31 Sup. Ct. 324, to allay an apparent inharmony in prior decision as to whether such refusal could be expeditiously corrected by mandamus or whether the question should be reserved for decision when the cause might go up on writ of error after trial and judgment in the circuit court.

In the case of *Bluefields S. S. Co. Limited v. Steele*, 184 Fed. 584, decided by Third Circuit Court of Appeals some two weeks prior to the decision in the *Harding* case, there seems involved more directly the nature of federal jurisdiction with respect to controversies only exceptionally cognizable in federal circuit courts. We say exceptionally cognizable because the general rule of jurisdiction in a court is that this pertains to subject-matter and no process in *personam* can create it, if subject-matter is not within the purview of what the court may consider.

In a federal court, however, the subject-matter is the incident of jurisdiction, while the relation parties bear to the court is the essential predicate to prevent its act from becoming *coram non judice*.

Therefore the question comes up, at least, in the mind of the writer, whether, as no

waiver of any character or kind can vest a court with jurisdiction over subject-matter in courts where the *personnel* of a litigant is merely incidental, can the necessary *personnel* be created by consent in a court where the subject-matter is the incident.

The *Bluefields* case does not discuss the question, but holds that "in accordance with the decision in *Western Loan Co. v. Butte & Boston Min. Co.*, 210 U. S. 368, "a federal court may obtain jurisdiction over a controversy by appearance without objection," just as in a state court of general jurisdiction, at least where there is merely a question of a court in the proper district.

The *Bluefields* case comes squarely under the ruling referred to, which ruling followed that of *In re Moore*, 209 U. S. 490, where the matter was elaborately discussed by Justice Brewer, with his conclusion dissented from by Chief Justice Fuller.

Justice Brewer conceded that, if there were no diversity of citizenship, no jurisdiction could be acquired by appearance or any other kind of waiver and, therefore, there was no way whereby a controversy between citizens of the same state could be determined *coram judice* in any federal court, as "diversity of citizenship is a condition of jurisdiction."

The general principle, then, that relationship of parties to each other is of the subject-matter, that is to say, a controversy to be cognizable in a federal court must be a controversy which has annexed to or inhering in it a claim of right belonging to a particular individual, or class of individuals.

This is the purely constitutional aspect of jurisdiction which statute cannot invade. Within this aspect, as is held, but not outside of its bounds, statute may vest jurisdiction in such subordinate courts as it sees fit to create.

Thus, in *Ex parte Wisner*, 203 U. S. 449, it was held that, where a non-resident sued a non-resident (both being of different states) in a state court, a federal court, where the non-resident was served, must

remand the cause to the state court, because no jurisdiction was acquired by removal. This is, of course, tantamount to saying that such suit could not be brought in a federal court sitting in the district where service was had.

In the Moore case, where the same diversity of citizenship existed, the defendant removed the cause to the circuit court of the district where service was had. Justice Brewer said: "This brings up two questions, first, whether both parties did consent to accept the jurisdiction of the United States court, and second, if they did, what effect such consent had upon the jurisdiction of the United States court."

It was held there was consent by defendant in filing petition for removal and by plaintiff in failing to challenge jurisdiction, and instead filing an amended petition therein and going to trial. This seems enough, if any consent might confer jurisdiction.

Justice Brewer points out that, at least, the United States court in the district of the defendant's residence would have had jurisdiction, if suit had there been brought, and he cites *Ex parte Schollenberger*, 76 U. S. 369, where it was said that "the act of congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts." And so are other authorities, in some of which the opinions were written by Chief Justice Fuller, who dissents in the Moore case.

The Chief Justice thus speaks in his dissent: "Jurisdiction of the subject-matter is given only by law and cannot be conferred by consent" and therefore, the objection that a court is not given such jurisdiction by law, if well founded, cannot of course, be waived by the parties. In my judgment section 1, in cases where litigants are citizens of different states, confers jurisdiction only on the circuit court of the district of plaintiff's residence, and the circuit court of the district of defendant's residence. And it is not conferred on the circuit court of the district of either of them, and cannot be even by consent."

It is hard, indeed, to see why, if general diversity of citizenship cannot be ignored by parties who want to go into any federal court, a particular diversity which debars from a particular federal court can be converted by consent into a different, but requisite, diversity.

The error it seems to us in making this distinction is in extending a privilege generally which congress has limited specially, and this upon the theory that federal circuit courts are courts of general jurisdiction.

They are not, it seems to us, courts of general jurisdiction. Their jurisdiction is to dispose of a cause to the same extent and no further than the court of ordinary jurisdiction might dispose of it. If this were not so, their jurisdiction in causes brought in the federal court ought to be different than in causes removed to them from state courts.

If the court of ordinary jurisdiction is of general jurisdiction that defines the jurisdiction of the federal court. If it is of inferior jurisdiction the federal court's jurisdiction ought, accordingly to be circumscribed. Therefore, the federal court is a court of relative or specific, rather than of general, jurisdiction. It simply takes the place of the ordinary court.

It may be, that a federal circuit court is a court of general jurisdiction, when acting purely as a federal court, but this seems not the test of what it is when acting *pro hoc vice* a state court. It might be a very inferior court generally and yet be competent to execute the function of a substitute court.

How ill the rule declared in the Moore case may work, may be imagined from a view of the *Bluefields* case applying it. In this case a receivership was established by a federal court, where jurisdiction was obtained by consent. This may, or may not, have been satisfactory to the creditors of the moribund defendant, but they have no privilege of objecting, though they would seem to be the principal parties affected. In such a case there is every presumption that a local court ought to be far more cap-

able of managing the assets for their benefit than that of a foreign jurisdiction. It is true the Bluefields Company was a foreign corporation, but presumptively it had creditors in the locality where it was operating, and they may have been desirous for the court of their residence to administer its assets. Some foreign creditor, however, had the ability to deprive them of their choice.

The Moore case seems to press the advantage of choice of courts in favor of non-residents over residents to a limit beyond any intention by congress to confer. As this privilege is beyond common right, and the necessity for it is more in fancy than in fact, its allowance ought to be sparingly recognized. To support a sort of dignity in federal courts is no reason for any liberality in its recognition. But the general argument, which finds an exception in the Moore case, seems to us against the ruling in the Harding case.

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## NOTES OF IMPORTANT DECISIONS

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**ESTOPPEL—DIRECTING VERDICT FOR INCONSISTENCY IN TESTIMONY OF PLAINTIFF AT A FORMER AND LATER TRIAL.**—There seems no principle more firmly imbedded in American law than that the credibility of a witness is exclusively for the jury and no species of refinement allows it to be taken out of their province. Contradictory statements both in and out of court and made with or without solemnity are for the jury's disposal. Parties as witnesses come under the same rule as the witnesses, except that admissions are counted against them, but not in the way of strict estoppel, except at least there be reliance on such admissions and the working of prejudice thereby, but purely as affecting credibility.

It seems to us that the province of the jury in judging of credibility of a witness was invaded in the recent case of *Smith v. Boston Elevated Ry Co.*, 184 Fed. 387, decided by First Circuit Court of Appeals.

It appears that a plaintiff sued and obtaining judgment the case was reversed on appeal. Her testimony on the second trial was inconsistent with what she swore to on the former trial and the court says: "It seems apparent

that at the second trial the plaintiff's testimony was directed to meeting" a certain statement "in our former opinion," etc.

Let us concede that the plaintiff did not make out a case in her former testimony and she was in the attitude of one who appears to have changed her testimony to meet the view of the court to make out a case, still that appearance might be explained to the satisfaction of the jury. There was the privilege of cross-examination to make her explain and if she refused to attempt to explain, or her explanation was lame, the jury is still to say, if she is now telling the truth or not.

The court said: "A plaintiff, we think, after being sworn to facts resting in his own observation and knowledge before one jury, should not be permitted to swear to facts directly inconsistent and to obtain from a second jury a verdict in his favor which will involve the conclusion that his testimony at the first trial was knowingly false." Upon what principle would he not? Estoppel does not figure in the matter. Suppose the jury had decided against the plaintiff in the first trial, would not this be to say that what the plaintiff first swore to was untrue? The principle of *falsus in uno* is not a principle of estoppel, nor do we conceive it to be binding on a jury to compel it to reject testimony.

But suppose the former jury believed it, that only establishes that it preponderated in force over what was opposed to it.

The court, however, seems little satisfied with the broad statement we have quoted, because it further remarks: "As the plaintiff was not corroborated, and as she was discredited by her former inconsistent testimony, we are of the opinion, that in the absence of any substantial explanation of this inconsistency, the trial judge was justified in concluding that, if the plaintiff should have a verdict, it would be his duty to set it aside, and therefore in directing a verdict for the defendant."

If the inconsistency spoken of was worse than that in above excerpt it must have been pretty bad. Here we see the court says there was no "substantial explanation." That was a pure question for the jury, if there was any attempt at explanation. Further as the jury was permitted to believe the plaintiff, though supposedly uncorroborated, it was not for the court to put her on the footing of an accomplice in crime. But the crowning inconsistency in the excerpt is its saying: "She was discredited by her former inconsistent testimony." It was for the jury to say whether she was "discredited" or not. The entire excerpt shows the court outside of its province and in-

vading squarely that of the jury. When the court says if parties can do this trials will never end, it might be replied that if courts will keep strictly within their own provinces, they will probably assist more to that result than if they invade that of the triors of fact.

**BULK SALES LAW—CONSTRUCTION OF THE PHRASE "PRESUMED TO BE VOID" WHERE THERE IS NON-COMPLIANCE WITH STATUTE IN REGARD TO NOTICE, ETC.**—The Mississippi Supreme Court lately held that the words "presumed to be fraudulent and void" used in reference to sales in bulk meant conclusively presumed, etc. *Morse D. G. Co. v. Rowe & Carrithers*, 53 So. 626.

The condition of this presumption arising is the failure to inventory the goods, purchaser not demanding names and addresses of creditors and amounts owed to them and the purchaser not notifying them before sale is made.

It is readily to be perceived that up to the enactment of this statute merchandise in bulk could be disposed of upon valuable consideration just as other property, and even though a seller might be intending fraud, yet, if his intent is unknown and unparticipated in by a purchaser, the latter's title would be good.

By the statute, a class of property is made less purchaseable unless an intending purchaser takes certain precautions against the interest of third persons being affected. The seller's general right of disposition upon valuable consideration appears as before. This former right was to sell for a valuable consideration and the new statute does not, in terms at least, cut out that right.

What then does it do? It seems to provide for his creditors being allowed to produce evidence that the seller intends not merely to sell for the consideration proposed to be paid, but to sell so he may "spirit away" the proceeds and his creditors be left remediless.

It is not said that the purchaser may not pay over the purchase price to the seller if a creditor merely asserts fraud without seeking to enjoin the sale.

Nor is it said his contract to purchase might be avoided by a seizure under attachment. The statute could have operation by putting the purchaser on proof to show, that the seller intended to exercise purely his legal right to sell for a valuable consideration, that right undoubtedly existing until the statute was enacted.

And this mere reasoning of ours is in accord with construction by other courts. In

New York the statute whose constitutionality Judge Vann defended against the prevailing opinion, read "Shall be fraudulent and void."

It was amended so as to read "will be presumed to be fraudulent and void," and Judge Vann spoke of his preference for the amendment "because although effective it is not so harsh."

In *Jacques & Tinsley v. Carstarphen Co.*, 131 Ga. 8; in *Black v. Schwartz* 65 S. R. A. 315 (Utah) and in *Hart v. Roney*, 93 Md. 433, the word "presumed" is taken to mean that prima facie fraud is meant. Indeed how else may it be taken?

The statute otherwise employs several wholly useless words. It could simply have said the sale shall be void. That is all that is aimed at, if the presumption is irrebuttable? No one cares to know why there is invalidity. Why such redundancy in expression?

But this Mississippi statute was enacted in 1908, and before that bulk sales statutes had been passed in many states. They employed various forms of expression, thus "conclusively presumed;" "prima facie that said sale was fraudulent; will be presumed;" "will be fraudulent and void;" "shall be fraudulent and void;" "shall be void;" "shall be deemed fraudulent and void." Shall it be said that Mississippi legislature intended a "conclusive presumption," when New York had amended its statute by employing the words of the Mississippi act so as to avoid the ruling that to say "shall be void" invalidated the law? It seems too plain for contention there are two forms for those bulk sales statutes—one making the sales void absolutely and one making them prima facie void, and this legislation is so general and of such long standing that any legislature is presumed to have known the necessity of arraying itself squarely with one line or the other. If it does not bring its statute squarely on the side of those which takes away all possible validity to a contract, no intendment in construction should assist it.

We may say in conclusion that there is a sort of naivete in the Mississippi court's observation that "under the law as it stood before, there was no great difficulty as a rule in making out a prima facie case of fraud." This is refreshing. We do not think it is the experience of attorneys that it is easy to make out a case of prima facie case of fraud where one party buys goods from another party. On the contrary, the presumption is that one does not part with what he has to another unless there is an adequate quid pro quo, and this is ordinarily pretty hard to get over.

# UNCONSTITUTIONALITY OF STATUTE AS A DEFENSE TO MANDAMUS AGAINST A PUBLIC OFFICER REFUSING TO ENFORCE SAID STATUTE.

The Supreme Court of Oklahoma lately held that where there is nothing in the statutes of that state which, expressly or by implication, makes it the duty of the Secretary of State to question the validity of any proposed legislative enactment offered by means of the initiative or referendum, as an amendment to the constitution or for adoption as a statute of the state, and where he has no personal interest to be affected, he merely has a ministerial duty to perform when a measure is properly proposed, which duty excludes his raising any question as to the measure's validity. This conclusion is drawn by the court from its following what it deems the weight of authority against the right of a public officer to plead the unconstitutionality of any statute, for failure to enforce which he is proceeded against by mandamus.<sup>1</sup>

Assuming for the purpose of this article, that it is the rule generally that a public officer may defend in mandamus by alleging the unconstitutionality of a statute imposing a duty not ministerial, it will be attempted here to review American decision upon a question upon which courts seem not only in conflict, but also singularly lacking in any showing of sustained reasoning for their conclusions.

Indeed, it appears to the writer that the only squarely legal basis for the doctrine that a ministerial officer cannot challenge the constitutionality of a statute purporting to command performance of certain official acts, is found in a West Virginia case, where a tax assessor was forbidden to urge in his defense the constitutionality of a law he was directed to disregard.<sup>2</sup>

In this case a certain section of a tax statute had been declared unconstitutional by the supreme court of West Virginia and the governor of the state deeming, that, upon the reasoning of that court, a certain other section of the same statute was likewise unconstitutional, directed the state assessor to notify the county assessors to disregard the exemptions from taxation sought thereby to be created. Buchanan, one of such assessors, claiming that said other section was constitutional, assessed property in his county in accordance with its provisions, and the state assessor sought by mandamus to compel him to obey instructions issued by direction of the governor. The court made the writ absolute upon the ground, that the governor, being the chief executive officer of the state and being bound by the constitution to see that its laws were faithfully executed, had a specific duty to direct, that the statute be not observed by subordinate officers of the commonwealth, it being open for any one whose personal interests were affected to appeal to the courts for a review of such direction by the governor.

This kind of holding puts life into the constitutional provision referred to, and assists, by relation back, the presumption of a statute's constitutionality so far as officers of the executive department of a state are concerned. Some of the courts have said, that the officer should act on the presumption of a statute's constitutionality, because the legislature in enacting it have by implication so said. But, by the principle underlying the Buchanan case, this is not strictly correct. It is more accurate to say the chief executive is by silence presumed to deem it constitutional, and what he deems constitutional is by his subordinates assisting him in the execution of the laws to be taken as conclusive, until the judicial department shall in proper proceeding arrest execution. It certainly seems true that, if a governor may in terms direct a subordinate officer, to disregard a statute duly passed because he deems it unconstitutional, such subordinate ought to

(1) *Threadgill v. Cross, Secretary*, 109 Pac. 558.

(2) *State ex rel. v. Buchanan*, 24 W. Va. 362.

be bound to obey, as an officer, whatsoever statute the governor regards as constitutional, and that every statute should be presumed to be so regarded by the governor, if he acquiesces without objection to its enforcement.

This theory is a consistent theory, while that of the officer being affected in the conduct of his office by the judgment of the legislature upon the constitutionality of its enactments has in it an element of confusion. It mingles two of the great departments of our government, or, as perhaps more properly expressed, permits one to encroach on the other, when each is to be separate and independent. We see, also, by the Buchanan case, that it was ruled, in effect, that the governor was allowed to override, so far as subordinate officers in his department were concerned, the legislative conclusion of constitutionality.

These introductory remarks being intended as a sort of key to my discussion of the conflicting cases on the question of the right of a public officer to resist mandamus by asserting the unconstitutionality of the statute commanding the performance of what a relator seeks, I proceed to notice some of these numerous cases.

*Official Duty Affected by a Trust or Interest.*—In South Carolina a late case<sup>3</sup> recognizes the rule as shown by many prior adjudications therein cited, that an officer is to presume the constitutionality of a statute and obey its command, but it is said "if the nature of his office is such as to require the officer to raise the question (of constitutionality) or if his personal interest entitles him to do so," the court will pass upon the validity of the statute. This case does not inform us what test shall indicate such a requirement, but the facts show the officer proceeded against had some personal interest in refusing to comply with relator's demand. This does not appear to be a good exception, because all personal interest of a particular officer ought to be ignored when the right to official action is otherwise demandable. There was a dissenting opinion upon the ground, that by

the decision the well-established rule in that state was not followed.

In a case from New Jersey<sup>4</sup> we get something of what is meant by the nature of the office which may obligate an officer to set up unconstitutionality in mandamus. In that case there was a proceeding by mandamus to compel the mayor and council of a city to divide the wards into election districts and appoint judges and clerks, and they set up unconstitutionality of the statute. The court said: "It is claimed \* \* \* that the duty of the common council is merely ministerial, like that of a clerk who is directed by law to administer an official oath. \* \* \* The cases seem widely different. \* \* \* The common council upon which the present duty is cast are in the exercise of the powers of local government for the city, with the duty to continue their functions until they are lawfully displaced. If they should execute the act in question, there might, and probably would be, two distinct bodies in existence, each claiming to be the lawfully constituted legislative body of the city. The consequences which would flow from such a state of things will impel the court to hear the defendants and refuse a mandamus to enforce obedience to the act, if it can be shown to be without authority."

The fact, that a statute is to relieve an officer of a duty he would be otherwise bound to perform or that it would materially add to his former duty, places an officer in a situation somewhat different, than if it merely commanded the doing of a new thing, and it would seem that he ought to be allowed to ascertain whether the old duty has been superseded or modified. What the court says about the consequences to others from complying with a statute believed by an officer to be unconstitutional would seem to be a good answer to those courts which urge that great confusion in administration would result from a ministerial officer being allowed to question a statute's constitutionality. On both sides there is the plea of necessity or the *argumentum ab inconvenienti*.

(3) *State ex rel. v. Burley* (S. C.), 61 S. E. 255.

(4) *Pell v. Newmark*, 40 N. J. L. 71.

The case of Pell v. Newmark was approved in a later case<sup>5</sup> where an act of the legislature directed the division of a township and that the commissioners of the two new townships should meet to divide the property and apportion the indebtedness, the commissioners of the old township who remained in office refusing to meet in conference the new commissioners, upon the ground of the statute's unconstitutionality.

Nature of office which requires an officer to oppose mandamus by alleging belief in a statute's unconstitutionality is indicated in a late case from Pennsylvania.<sup>6</sup> This goes into a very thorough review of conflicting decision and holds, in effect, that the grade of an office, and its being constitutional in creation, may be the test of obligation to raise a question of constitutionality. The court said: "The weight of authority appears to be in favor of the cases which hold to the right and in some instances the duty of administrative officers to refuse to act under what they honestly believe to be an unconstitutional act." And "although we do not decide that all state officers have a right to refuse to act under a law because they conceive it to be unconstitutional and thus constitute themselves tribunals to pass upon the validity of acts of the legislature generally, we do hold in this particular case, that the state treasurer, being a high constitutional officer of the commonwealth, entrusted with funds of the state, under the law, has the right to raise, by his pleading, the constitutionality of the act fixing the salaries of the judges of the commonwealth." This case referred to Commonwealth v. James,<sup>7</sup> which held that a clerk of court could not set up unconstitutionality in regard to performance of a mere ministerial duty.

In a Kentucky case<sup>8</sup> mandamus was asked against a state auditor to audit an account appropriated by the legislature. The

court admitted the general rule to be that no one may assail a legislative act as unconstitutional unless his rights are involved or for some other reason he has a right to question it. Then the court goes on to say that the state constitution provides that: "No money shall be drawn from the state treasury except in pursuance of appropriations made by law," and the statute forbids the auditor issuing a warrant upon the treasury "unless the money to pay the same has been appropriated by law." "If," says the court, "the act of the legislature be void for want of power to pass it, or because it was not passed in the manner required by the constitution, then it is not law, and the auditor is vested with such power and occupies such a position, that it is not only his right but his duty, whenever he is called upon to order the payment of money out of the treasury to inquire whether it is being done legally. He is in a certain sense a trustee, and the public interest requires that his office should give him the right to question the validity of a legislative act under which, by means of his warrant, the public money is to be expended." This ruling was dissented from, but only, because the statute's validity was not challenged, because the power to enact same was not in the legislature, but only because it had not been passed in the manner the constitution prescribed. The dissenting judge thought, if the law was constitutional on its face, the auditor could not go behind it.

It seems to me that what is said about the constitution and the statute forbidding payment of money unless there was a valid statute of appropriation, does not meet argument of presumption, which other courts recognize, as to validity, and therefore this case is at bottom like that of Commonwealth v. Mattheus, *supra*. One of the majority in a separate opinion quotes from Mechem on Public Officers, sec. 523, that: It is not within the duties of a ministerial officer to pass upon the validity of laws *prima facie* valid," avoiding the effect of such a rule by referring to admission of illegality in the passage of the act. Evi-

(5) Lakewood v. Brick, 55 N. J. L. 275, 26 Atl. 91.

(6) Commonwealth v. Mattheus, 210 Pa. 383, 59 Atl. 961.

(7) 135 Pa. St. 480.

(8) Norman v. Board of Managers, 97 Ky. 556, 20 S. W. 901, 18 L. R. A. 556.

dently what this judge understands by *prima facie* validity in a statute is, that the officer must believe it is *ratione materiae* constitutional.

In California<sup>9</sup> a city auditor was held entitled to set up unconstitutionality where it was sought to compel him by mandamus to draw a salary warrant, the court saying: "We see no force in the point that the respondent has no interest in the question here invoked. The act under which petitioner claims being unconstitutional and void, there is no law authorizing respondent to draw the warrant; and to do the act demanded of him would be to violate his official duty and oath, and subject himself to liabilities and penalties." This is not a very satisfactory statement, because I do not believe there would be any liability or penalty for paying over on an unconstitutional statute, and if there were, few people would be willing to hold a fiscal office under such a rule, and what is said about violating official duty and oath would apply to any and every officer. In other words, there is a begging of the question as to whether or not there is any presumption, directly or indirectly, as to the validity of an act of a legislature.

*Cases Where Other Considerations Than Interest or Duty of Officer Affect the Question.*—We see from the case of *Pell v. Newmark*, *supra*, public inconvenience may incline the court to allow the question of constitutionality to be tested in mandamus. In a North Carolina case,<sup>10</sup> where the right to question a statute requiring the clerk of a court to administer an oath was denied, the opinion of the court stated nevertheless that: "If every subordinate officer in the machinery of the state government is to assume an act of the legislature to be in violation of the constitution and refuse to act under it, it might greatly obstruct its operations and lead to most mischievous consequences. This is only permissible, if at all, in cases of plain and palpable violation of the constitution, or where irreparable harm will follow the action." This

*dictum* having so little of certainty in it, might, perhaps, have been as well left unuttered.

In an early Massachusetts case<sup>11</sup> there is a somewhat similar *dictum* in the way of qualifying a general rule as follows: "If it should manifestly appear that a tax was illegally assessed \* \* \* or the persons assessed would have a right to restitution by action, without doubt the court would withhold the exercise of its power rather than throw the parties into an expensive field of litigation." Illegality that might seem manifest to one officer might not as to another. The latter alternative, however, shows there are no hard and fast rules as to allowing or not, unconstitutionality to be pleaded, though the officer proceeded against be inferior and his duties ministerial.

In another tax case shown in an old Wisconsin decision<sup>12</sup> the court speaking broadly on the theory of an unconstitutional law binding no one, yet says, in addition: "There can be no doubt that the taxpayers of the town could have maintained an action to enjoin the levy of the town tax, and the town clerk, by refusing to levy the same, acted in a certain sense as their representative. It may be further observed that the town clerk cannot properly levy a tax without authority of law, and after holding that there is no authority of law for levying the particular tax, it would seem illogical that it is still the duty of the clerk to levy the same."

This is not at all a well-reasoned opinion, but it at least shows the disposition of the Wisconsin court to consider consequences to third parties in allowing or not an officer to challenge the constitutionality of a statute.

Before turning to the cases, which very broadly deny the right to question constitutionality in mandamus to a public officer, a North Dakota case,<sup>13</sup> following somewhat the theory in the Kentucky case, *supra*,

(11) *Waldron v. Lee*, 22 Mass 323.

(12) *State ex rel v. Tappan*, 29 Wis. 664-686.

(13) *McDermont v. Dinnle*, 6 N. D. 276, 69 N. W. 294.

(9) *Denman v. Broderick*, 111 Cal. 97, 43 Pac. 576.

(10) *Gilmer v. Holton*, 98 N. C. 26, 3 S. E. 812.

should be referred to. There it was sought to compel city officers to pay a judge's salary. The court spoke of respondents being charged with the duty of "protecting the funds of the municipality," and said: "It would be a violation of their municipal duty should they proceed to pay out the funds of the city upon unwarranted and illegal claims."

It perhaps may be fairly claimed, that there is a strong tendency in decision to allow fiscal officers to protect the public as to public moneys in their hands being diverted therefrom on any mere presumption of a statute's validity, even though their custodian might not be personally liable on his official bond, if he honestly proceeds upon such presumption.

*Cases Denying the Right to Plead Unconstitutionality.*—A leading case under this head is by Louisiana Supreme Court.<sup>14</sup> There was mandamus to compel a state auditor to pay certain claims appropriated for by statute, and it was broadly held that: "Nothing can be inquired into, but the question of duty on the face of the statute and the ministerial character of the duty he is charged to perform."

This case does not cover, possibly, such a question as in *Pell v. Newmark*, *supra*, but it is squarely opposed to all those on the theory of their being a trust character in a fiscal officer. There is a very full discussion of authority in this case.

In Utah a decision also referred to the auditing and payment of a claim and the plea that the statute directing same was unconstitutional.<sup>15</sup> The court, in refusing to allow such a defense to be set up, said: "It would be deciding a constitutional question affecting the right of third persons at the instance of officers whose duties are merely ministerial, and who have no direct interest in the question and cannot in any event be made responsible. We are not authorized to pass upon a constitutional question so raised in a proceeding by mandamus."

(14) *State ex rel. v. Heard*, 47 La. Ann. 1679, 18 So. 746, 47 L. R. A. 512.

(15) *Thoverson v. State Board*, 19 Utah 18, 57 Pac. 175.

*Extreme Cases on This Subject.*—A Nebraska case<sup>16</sup> was where mandamus was sought to compel county supervisors to divide their county into certain districts and might easily have been disposed of under such a ruling as was adopted in *Pell v. Newmark*, *supra*, but instead thereof the Supreme Court of Nebraska indulges in considerable language not particularly to be commended as discriminative argument, about the constitution being the fundamental law, and statutes in conflict therewith being "absolutely void and of no effect whatever," says such a statute "is no law and binds no one to observe it," and then somewhat inconsistently concludes as follows: "The peace of the community, the orderly conduct of government, require that only in a clear case of unconstitutionality should they (ministerial officers) refuse obedience to legislative acts. They always disregard them, and the question is presented to the court as to whether or not obedience will be compelled, the question of the validity of the act is presented, and obedience will not be compelled if the act is unconstitutional." In other words, this court says an unconstitutional law is absolutely void and of no effect whatever," but though it is of no effect, it ought to be obeyed unless clearly unconstitutional, and if not clearly unconstitutional officers ought to obey it, yet if they choose to disobey it, we will overlook their disobedience and decide the question of constitutionality. It is rather hard to find any logical ground for the court to rest on outside of the *Pell* case.

There is some broad language in federal decision in regard to unconstitutional statutes being absolutely void. Thus it was said by Justice Field:<sup>17</sup> "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office." Every word of this excerpt is true in one or more senses, and especially where private rights are concerned, or so far as title to office is concerned, but the question really at issue here

(16) *Van Horn v. State ex rel.*, 46 Neb. 62, 64 N. W. 365.

(17) *Norton v. Shelby Co.*, 118 U. S. 425.

is, whether or not there is any presumption upon which the executive department of a state should proceed out of respect to another great department, until the judicial department, the sole arbiter between them, shall have decided.

A later case by the federal supreme court<sup>18</sup> decides, in effect, that where the legislative and judicial departments of a state have acted in favor of constitutionality, a state officer should have more than an official interest when he appears in that court alleging invalidity as to a question reviewable in that tribunal. Justice Brewer said: "We think the interest of an appellant in this court should be personal, and not an official interest, and that the defendant having sought the advice of the courts of his own state in his official capacity should be content to abide by their decision." But why should he, if the federal law being supreme, the state law which conflicts therewith is of no force whatever. Simply because the state has the right to direct its officials what to do whether it violates, in their opinion, federal law or not. By parity of reasoning this may be extended back to the chief executive of a state, controlling either by direct command or by presumption of acquiescence in legislation, the official acts of subordinate officers in the execution of presumptive law.

But the courts have not proceeded on the theory of direction, express or implied, of the chief executive bound by constitutional provision to see that the laws are faithfully executed, but some of them have considered ulterior results as constituting or not, an exception to the rule that a public officer cannot inquire beyond the terms of a duly proclaimed statute. This, perhaps, is a more practical rule, than to remit everything in the way of constitutionality to gubernatorial duty. At all events it seems useless for the courts to have a hard and fast principle, going beyond denial of right by any officer to plead unconstitutionality when the performance of the ministerial act, performance of which he resists, is of

great public consequence. Upon this theory the Oklahoma court might, in discretion, have permitted the question of constitutionality to have been raised. There is really no great reason why a mere rule of practice should be unbending, when public interest is at stake.

N. C. COLLIER.

St. Louis, Mo.

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#### BANKS AND BANKING—COLLECTION OF DRAFTS.

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##### FIRST NAT. BANK OF MEMPHIS v. FIRST NAT. BANK OF CLARENDON.

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Court of Civil Appeals of Texas. Dec. 31, 1910. Rehearing Denied Feb. 11, 1911.

134 S. W. 831.

In accordance with custom, a bank to which a check is sent for collection in the city in which the drawee bank is located may accept the drawee's draft or check in payment, and is not negligent in failing to demand payment in money.

**DUNKLIN, J.** The First National Bank of Clarendon recovered a judgment against the First National Bank of Memphis, from which the latter bank has appealed.

The recovery was for money remitted to the Memphis bank by the plaintiff bank in satisfaction of two checks which the plaintiff bank had undertaken to collect, and which had been sent to it for collection by the defendant bank. The checks were drawn by the Clarendon Mercantile Company in favor of the Mickle-Burgher Hardware Company, which the latter company had deposited with the Memphis bank for collection, and which were sent by that bank to the plaintiff bank for the same purpose. The checks were drawn on the Citizens' Bank of Clarendon, and the drawer had money to his credit with the drawee sufficient to pay the checks, but on the day following the presentation of the checks it closed its doors on account of insolvency. The plaintiff bank presented the checks for payment on the same day they were received, which was one day prior to the cessation of business by the Citizens' Bank, and accepted in payment therefor drafts upon other banks given by the Citizens' Bank, but these drafts proved to be worthless on account of the insolvency of the Citizens' Bank who issued them. As soon as plaintiff received those drafts, it forwarded to the Memphis bank its own check on the Ft.

(18) Brockston County Ct. v. State, 208 U. S. 192.

Worth National Bank; its cashier believing at the time that the drafts so accepted would be paid. Before the Memphis bank received the check drawn by the plaintiff bank, its cashier was notified over the telephone of the insolvency of the Citizens' Bank of Clarendon, and promised to return the same. Relying upon this promise the cashier of the plaintiff bank took no steps to recall its check sent to the Memphis bank and later the Memphis bank collected the check, and, having refused to refund the amount thereof to the plaintiff, this suit was instituted to recover the amount so collected by the Memphis bank. The Clarendon Mercantile Company, drawer of the check, on the Citizens' Bank of Clarendon, and the Mickle-Burgher Hardware Company, the payee, were made parties defendant with the Memphis bank, but their demurrer to plaintiff's petition was sustained, and they were dismissed from the suit. Appellant assigns this ruling of the court as error. It had no plea over against its codefendants, who were so dismissed, but it insists that it was acting as the agent only for the Mickle-Burgher Hardware Company to collect the check and that no liability could be established against it, unless the liability of the drawer and drawee of the check was first fixed. The petition charged that appellant had received the money and the facts already recited were set out in the petition. We think that such allegations were sufficient to show liability on the part of the Memphis bank, and, if there was error in sustaining the demurrer urged by its codefendants, we are unable to perceive how the same could be prejudicial to appellant.

The evidence showed that, when the plaintiff bank presented the checks to the Citizens' Bank of Clarendon, the latter bank had money on hand sufficient to have paid the same in currency. The appellee alleged in its petition a custom among banks to accept payment in drafts of check received by it for collection, and evidence was introduced establishing that custom, which was well known. As a predicate for a verdict in plaintiff's favor, the jury were instructed that they must find that plaintiff exercised due diligence and care in receiving the drafts in payment of the checks which they attempted to collect; that in so doing plaintiff in good faith believed that the drafts so received by it would be paid; and, further, that a demand for cash on the checks would have been refused by the Citizens' Bank. The jury were also instructed to return a verdict in favor of the defendant if they believed that the Citizens' Bank would have paid cash in satisfaction of the checks, if the same had been demanded. Appellant insists that, in the absence of an instruction

from it to the contrary, appellee had no authority to accept payment of the checks in anything but money, and upon this question the authorities seem to be in conflict. In *National Bank of Commerce v. American Exchange Bank of St. Louis*, 151 Mo. 320, 52 S. W. 265, 74 Am. St. Rep. 527, the Supreme Court of Missouri holds that, when a bank accepts a worthless check in payment of a draft which it undertakes to collect, it makes the check so accepted its own, and its liability is the same as if cash had been received, and that a usage of banks to so collect checks is unreasonable. The opinion in that case is in line with numerous authorities cited therein. On the contrary, it is held in many states that a collecting bank is justified by usage or custom in receiving as payment the check or draft of the debtor drawn on another bank. See 5 Cyc. 506, and decisions there cited. The latter rule seems to us supported by better reasoning and more consistent with equitable principles which should govern in such transactions. It is a matter of common knowledge that the consideration received by a collecting bank for such services is small, and, if a custom or usage has grown up among banks to accept drafts of other banks in lieu of money, authority to collect in accordance with custom and in the exercise of due diligence should be implied, in the absence of some special instruction to the contrary. An additional reason for the application of this rule in the case at bar is found in the fact that under the charge already quoted the jury necessarily found that the checks which the plaintiff bank undertook to collect would not have been collected in money, if money had been demanded, thus showing the worthlessness of the check which the plaintiff was employed to collect. 5 Cyc. 511.

The court did not submit the issue presented in plaintiff's petition of the agreement over the telephone by appellant's cashier to return the check mailed to him by appellee's cashier to cover the amount which appellee supposed would be realized upon the drafts accepted by it from the Citizens' Bank. This is a sufficient answer to the assignment complaining of the action of the court in overruling the exceptions to the allegation of those facts in plaintiff's petition. Nor was there error in admitting evidence of that agreement. The testimony shows that the conversation over the phone occurred before the receipt of appellee's check by appellant's cashier, and at a time when appellee's cashier could have stopped payment of it if he had so desired, and thus prevented appellant from collecting it. The agreement thus proven was certainly an admission against the interest of appellant by

its duly authorized agent intrusted with the conduct of the business then in hand.

W. H. Cook controlled and managed the business of the Citizens' Bank, and his testimony that the checks in controversy would not have been paid in cash, if cash had been demanded, we think was admissible as against appellant's objection that the same was the expression of an opinion only to the witness, as we know of no other method by which proof of that fact could have been made. In view of our conclusions noted above, we overrule appellant's assignment complaining of the refusal of a peremptory instruction in its favor, which it requested, and also another instruction, in effect, that it was negligence as a matter of law to accept payment of the check in controversy in anything except cash. We are of the opinion, further, that the verdict of the jury is sustained by the evidence.

We have found no error in the record, and the judgment is affirmed.

**NOTE.—Collecting Bank Required to Accept Only Legal Tender as Payment.**—The general rule is clearly stated by Mr. Justice Field in *Ward v. Smith*, 74 U. S. 447, 1 c. 452, 19 L. ed. 207 (1868): "That the power of a collecting agent by the general law is limited to receiving for the debt of his principal that which the law declares to be legal tender, or which is by common consent considered and treated as money, and passes as such at par, is established by all the authorities. The only condition they impose upon the principal, if anything else is received by his agent, is that he shall inform the debtor that he refuses to sanction the unauthorized transaction within a reasonable period after it is brought to his knowledge." Citing *Story on Promissory Notes*, sec. 115, 389. Accordingly the court held that a collecting bank was not authorized to receive in payment of a bond depreciated notes of another bank which, although constituting "the principal currency in which the ordinary transactions of business were conducted" in that locality, were not a legal tender for the debt.

In *National Bank of Commerce v. American Exchange Bank*, 151 Mo. 320, 52 S. W. 265 (1890), the facts were practically the same as in the Texas case, *supra*. The court, per Burgess, J., declared (p. 329): "The general rule is that an agent being authorized to receive money only, has no implied power to receive a check, or anything else except money, in payment and if he does so, he assumes the risk of its payment, and becomes liable to his principal for the amount of the check with interest from the date of its receipt by him. (*Essex County Nat. Bank v. Bank of Montreal*, 7 Bissell 193). In such circumstances the law will presume damages to the principal and dispenses with proof thereof. (*1 Daniel on Neg. Inst.*, 4th ed., sec. 335)." And further (p. 331): "Whatever the usage may be with respect to the surrender of an obligation for the payment of money to the obligor by the owner thereof upon receipt of a check given for its payment, as between an agent of the prin-

cipal and the principal's debtor it has no application in this case. (*Hall v. Storrs*, 7 Wis. 253). For under such circumstances such a usage or custom would be unreasonable and could not be invoked as a justification for such a course. (*Whitney v. Esson*, 99 Mass. 308)." Wherefore the plaintiff bank, which had received from the defendant bank a certain draft for collection, and according to the custom of banks in its locality, had accepted the obligor's check on another bank in payment, which check proved to be worthless, could not recover from the defendant the amount remitted on the collection.

In *Whitney v. Esson*, 99 Mass. 308 (1868), the court, per Chapman, C. J., said: "It is undoubtedly true that men who keep bank accounts are accustomed to give checks for their debts, and in most cases their standing is such that these checks are taken by their neighbors as readily as cash. This may make a common practice among men who are dealing on their own account, in respect to such dealings; but the practice falls short of a usage applying to the collection of drafts for absent parties. And it is not a reasonable usage that one who collects a draft for an absent party should be allowed to give it up to the drawee, and sacrifice the claim which the owner may have on prior parties, upon the mere receipt of a check which may turn out to be worthless."

So too in *Fifth Nat. Bank v. Ashworth*, 123 Pa. 212, 16 Atl. 506, 2 L. R. A. 491 (1888), Mr. Justice Paxson, delivering the opinion of the court, declared (p. 218): "It is safe to say, as a general rule, that when a bank receives a check from one of its depositors for collection, it must return him the check or the money. It is also equally clear that if the collecting bank surrenders the check to the bank on which it is drawn, and accepts a cashier's check, or other obligation in lieu thereof, its liability to its depositor is fixed, as much so as if it had received the cash. It has no right, unless specially authorized to do so, to accept anything in lieu of money."

In Kansas, it would seem, the same rule will be applied. Without directly passing on the point, the Kansas Supreme Court discussed the question at some length in *Noble v. Doughten*, 72 Kans. 336, 1 c. 353, 83 Pac. 1048, 3 L. N. S. 1167 (with case note), saying: "It is the sole function of a check to effect the transfer of money. It is of the essence of its definition that it is payable in money. 'Where a check is drawn for a given number of dollars, without in any other manner designating what kind of money it is to be paid, it is payable in coin if demanded, or current money. Nor can such a check be explained, either by verbal agreement, or by custom or any mercantile or other usage, to have any other or different meaning than that.' *Howes v. Austin*, 35 Ill. None of the parties to the instrument contemplate payment in anything else than money, and whenever a check is presented against funds on deposit to meet it, which the drawee is then ready and willing to deliver, the contract of the drawer has been fulfilled. To extend the drawer's liability further without his knowledge or consent would seem unjust. The acceptance by the holder of any other medium of payment than that expressed in the contract apparently ought to be at his own risk, and the doctrine that the acceptance of a substituted check is not payment unless it be paid, seemingly should be limited in its application to the ar-

rangement between the holder and drawee, and should be of no force to extend the liability of the drawer and endorser." But as the maker of a check is not discharged by laches in presentment for payment unless actually damaged thereby, he is held not discharged by failure to accept only money in payment, unless he can show actual damage. And see *Interstate Nat. Bank v. Ringo*, 2 Kans. 116, 83 Pac. 1-3, 3 L. R. A. (N. S.) 1179, case note.

But in *Farmers Bank and T. Co. v. Newland*, 97 Ky. 464, 31 S. W. 38 (1895), it was ruled that the usage of a bank to accept checks in payment of claims it holds for collection is binding upon a customer, whether he has knowledge of the usage or not, in the absence of any direction by him as to the mode of payment.

In *Savings Bank v. National Bank*, 98 Tenn. 337, 39 S. W. 338 (1896), the court declared (340): "A principal who selects a bank as his collecting agent, thus availing himself of the facilities which it holds out, in the absence of special directions, is bound by any reasonable usage prevailing and established among the banks at the place where the collection was made, without regard to his knowledge or want of knowledge of its existence. \* \* \* This rule \* \* \* is founded on sound reason. Every business man knows that in the constantly increasing volume and variety of banking transactions, the larger number of which are settled or disposed of by a simple exchange of credits, methods have been adopted by bankers to economize labor, reduce risks, and simplify dealings with one another, and with their customers. Some of these methods are of a general character, while others are dictated by local convenience or necessity. That these methods so prevail, is a fact of such public notoriety that no business man can well affect to be ignorant, and least of all a banking institution. It is in view of this we have held that in choosing a bank as a collecting agent the principal impliedly agrees that the agency may be performed in accordance with such reasonable methods as, sanctioned by experience, have ripened into usage, when such usage is not in contravention of a general law." It may be suggested, what usage in contravention of the general rule is reasonable?

In *Griffin v. Erskine*, 131 Iowa 444, 109 N. W. 13, (1906), the court said (p. 451): "The rule universally accepted is that under authority merely to collect, an agent, in the absence of a custom to the contrary, may receive nothing except money in payment. \* \* \* Checks, drafts, and other bills of exchange are the means of transferring the money in adjusting nearly all commercial transactions, and in authorizing an agent, whether a bank or individual, to make collections, it may be assumed in the absence of instructions to the contrary that the authority is to be executed in the manner usual and customary in the commercial world. While the agent may not accept anything but the actual cash in satisfaction of the claim, he may receive a check or draft, negotiable and payable on demand, which he has good reason to believe will be honored upon presentation, as a ready and more convenient means of obtaining the money in conditional satisfaction of the debt. Such payment offers no greater temptations to the agent than payment in cash to which it ordinarily is equivalent. If honored by the drawee payment relates back to the time of delivery. If not honored, the cred-

itor has parted with nothing by reason of conduct of his agent; for, though the agent may receive such paper as conditional payment, he is not permitted, on its strength, to deliver conveyances, leases, or other valuables at the risk of his principal."

A summary of the decisions leads to the conclusion that there is a tendency now obtaining to modify the general rule in two respects: (a) if a reasonable custom or usage of the collecting bank to accept some other medium of payment than money can be established, the principal is bound thereby in the absence of specific instructions to the contrary; (b) the collecting bank is not liable if the principal has not been actually damaged by its failure to accept only money in payment, this being held a case of "*damnum absque injuria*." To the writer it would seem that a strict adherence to the old rule is most in accord with justice and wise policy. At a very slight sacrifice of convenience it insures honest dealing and avoids the danger of loss always present in temporizing methods.

A. E. GANAHL.

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## NEWS ITEM.

### PRELIMINARY NOTICE OF THE AMERICAN BAR ASSOCIATION MEETING.

The next meeting of the Association will take place on August 29th, 30th and 31st, 1911, at Boston, Mass.

The President's address will be delivered by Edgar H. Farrar, Esq., of New Orleans.

The annual address will be delivered by William B. Hornblower, Esq., of New York City, on "Anti-Trust Legislation and Litigation."

Justice Henry B. Brown, of the U. S. Supreme Court, retired, will present a paper on "The New Federal Judicial Code" (Act March 3d, 1911).

Hon. Robert S. Taylor, of Fort Wayne, Ind., will present a paper on "Equity Rules 33, 34 and 35."

The annual dinner will be given on Thursday, August 31st, 1911. Samuel J. Elder, Esq., of Boston, Mass., and William F. Gurley, of Omaha, Neb., have accepted invitations to respond to toasts.

GEORGE WHITELOCK, Secretary.  
Baltimore, Md.

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## HUMOR OF THE LAW.

The enclosed clipping appeared as an advertisement in the Richmond, (Va.), *Times-Dispatch*: Wanted, a Slander Lawyer that can get punitive damages out of a wicked old woman that is rich. She discharged me with malice, and I am a lady, and she ruin my character and blite all the flour of my youth. She is a hateful old cat, and can't prove nothing, because everybody will swear she put the things in my trunk herself, the suspicious old thing. And her dirty dollars will be a heaven's blessing to honest folks, so tell me how much you can get, share and share alike, and write to Angulshed Soul, care of Times-Dispatch.

## WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of  
ALL the State and Territorial Courts of Last  
Resort, and of all the Federal Courts.

Arkansas.....	11, 28, 38, 54, 69, 109
California.....	18, 37, 46, 49, 56, 94, 95, 100, 115, 117
Georgia.....	44
Idaho.....	17
Kentucky.....	36, 90, 106, 120
Missouri.....	5, 19, 29, 31, 34, 42, 47, 55, 64, 68, 70, 74, 77, 79, 80, 83, 86, 91, 93, 96, 97, 101, 107, 112, 113, 114, 116, 122.
Montana.....	45, 87
New York.....	13, 32, 43, 57, 65, 81, 88, 98, 103, 125
South Carolina.....	59, 82, 108
Texas.....	16, 21, 23, 24, 25, 40, 50, 58, 62, 66, 67, 73, 75, 78, 84, 85, 89, 121.
United States C. C.....	39
U. S. C. C. App.....	3, 4, 9, 10, 20, 35, 41, 52, 99, 102, 110, 118, 119, 123.
United States D. C.....	6, 7, 8
United States S. C.....	12, 14, 15, 30, 51, 60, 61, 76
Washington.....	27, 33, 71, 72, 92, 104
West Virginia.....	1, 2, 22, 26, 48, 53, 63, 105, 111, 124

1. **Abatement and Revival**—Action on Note.—Creditor holding a note secured by personal indorsement and by a vendor's lien may bring action on the note and sue to enforce lien at same time.—*Post v. W. H. Bailey & Co.*, W. Va., 69 S. E. 910.

2. **Plea in Abatement**—A plea in abatement, if tendered after general appearance by demurrer, is properly disregarded.—*Burlew v. Smith*, W. Va., 69 S. E. 908.

3. **Aliens**—Deportation Proceedings.—Determination of a question of citizenship of a Chinese person by the Secretary of Commerce and Labor is conclusive, subject only to the jurisdiction of the federal court to determine on habeas corpus whether a proper hearing was accorded.—*Haw Moy v. North*, C. C. A., 183 Fed. 89.

—Regulation.—Congress has power to legislate not only with reference to undesirable aliens desiring to enter, but also with reference to deportation of those already within the United States.—*Haw Moy v. North*, C. C. A., 183 Fed. 89.

5. **Bailment**—Estoppel to Deny Ownership.—Bailees held not entitled to question the ownership of bailor unless they can show that the true owner is making an adverse claim.—*Oehmen v. Portmann*, Mo., 133 S. W. 104.

6. **Bankruptcy**—Exemptions.—A bankrupt is not deprived of his right to exemptions under the exemption statute of Georgia because of a fraudulent transfer of real estate made more than four months prior to his bankruptcy, nor because of false statements in writing made to obtain credit; and fraudulent concealment of assets, if relied on to defeat such right, must be proved with reasonable certainty.—*In re Cotton & Preston*, D. C., 183 Fed. 190.

7. **Persons Subject to Act**—A corporation whose business it is to buy electricity and resell it to consumers at a profit is engaged principally in trading within the meaning of Bankruptcy Act, July 1, 1898, and may be adjudged an involuntary bankrupt.—*In re Charles Town Light & Power Co.*, D. C., 183 Fed. 160.

8. **Property Passing to Trustee**—A contract under which a bankrupt was furnished bottled beer in cases construed, and held not one of bailment in respect to the cases and bottles, but of sale and return under which title pass to the bankrupt and on his bankruptcy to his trustees as to the cases and bottles on hand.—*In re Allen*, D. C., 183 Fed. 172.

9. **Property Passing to Trustee**—Under Bankruptcy Act, July 1, 1898, a trustee in bankruptcy takes title to a lease held by the bankrupt only in case he elects to accept it within a reasonable time after his appointment, when the vesting of the title relates back to the date of adjudication. If he does not elect to accept, the lease remains the property of the bankrupt.—*In re Frazin*, C. C. A., 183 Fed. 28.

10. **Statements Made by Bankrupt**—Statements made by bankrupt under oath in his examination before a referee may be considered in determining his right to a discharge.—*Shaffer v. Koblegard Co.*, C. C. A., 183 Fed. 71.

11. **Banks and Banking**—Agents.—Where a bank cashier gives a statement to accommodate a customer by whom it is presented to an officer of another bank, statements of the customer as to the written statement, or its effect are not binding on the cashier.—*Arkansas Nat. Bank v. Boles*, Ark., 133 S. W. 195.

12. **Depositor's Guaranty Fund**—A state statute creating a bank depositors' guaranty fund to repay deposits on insolvency of any bank held a valid exercise of the police power.—*Assaria State Bank v. Dooley*, 31 Sup. Ct. 189.

13. **Deposits**—Where defendant bank received a draft upon it, drawn by a correspondent in favor of another correspondent, held, that a notice to the latter that the same had been credited to its account, no actual credit having been made, was not binding.—*Walnut Hill Bank v. National Reserve Bank of City of New York*, 126 N. Y., Supp. 430.

14. **Private Banking**—The business of receiving deposits in small sums until they are sufficient to send to other states or foreign countries is banking and a proper subject for regulation.—*Engel v. O'Malley*, 31 Sup. Ct. 190.

15. **State Regulation**—The police power of a state extends to the regulation of the banking business and even to its prohibition except on such conditions as the state may prescribe.—*Noble State Bank v. Haskell*, 31 Sup. Ct. 186.

16. **Bills and Notes**—Acceptance of Order.—In an action against an acceptor of an order by a debtor to pay the creditor out of excess collateral in the acceptor's hands, held necessary to show that the debtor was insolvent.—*Ross v. W. D. Cleveland & Sons*, Tex., 133 S. W. 315. S. W. 315.

17. **Bona Fide Purchasers**—The mere failure to pay a periodical installment of interest on a note held not to charge a purchaser thereof with notice of any fraud or misrepresentation.—*Winter v. Nobs*, Idaho, 112 Pac. 525.

18. **Presentment**—At common law, the maker of a check was not exonerated by the payee's failure to present the check or give notice of dishonor, except so far as he was injured by the delay.—*Williams v. Braun*, Cal., 112 Pac. 465.

19. **Promissory Notes**—If one who is neither a payee in a note nor indorsee thereof signs his name on its back before delivery, he becomes prima facie a comaker and not an in-

dorser.—Heaton v. Dickson, Mo., 133 S. W. 159. W. 159.

20. **Boundaries**—Ascertainment and Establishment.—Where there is uncertainty in the specific description in a deed, the quantity named may be of decisive weight in determining the true boundary.—Montana Mining Co. v. St. Louis Min. & Mill. Co. of Montana, C. C. A., 183 Fed. 51.

21. **Particular Description**.—Where the calls in a deed extend beyond the survey, the court may correct the deed from the deed itself, by the reversal of calls and by calculation from the area mentioned.—William Carlisle & Co. v. King, Tex., 133 S. W. 241.

22. **Carriers**—Consignee's Delay in Removing Goods.—The law allows a reasonable time for a consignee to remove goods after arrival.—Eli Hurley & Son v. Norfolk & W. Ry. Co., W. Va., 69 S. E. 904.

23. **Duty to Passengers**.—Carriers are not liable for assaults by their servants acting outside of scope of their employment, unless they could have been anticipated and prevented by due care.—Houston & T. C. R. Co. v. Bush, Tex., 133 S. W. 245.

24. **Failure to Deliver Freight**.—In an action for failure to deliver freight, the receiver of the connecting carrier held not a proper party.—Davies v. Texas Cent. R. Co., Tex., 133 S. W. 295.

25. **Improper Loading of Cars**.—Where carrier violates instructions of shipper in regard to ventilation and injury thereby results to goods, the carrier cannot show that the car was improperly loaded.—Texas & N. O. R. Co. v. Davis-Fowler Co., Tex., 133 S. W. 309.

26. **Liability as Warehouseman**.—Liability of carrier held changed by acceptance and payment of freight to that of warehouseman.—Eli Hurley & Son v. Norfolk & W. Ry. Co., W. Va., 69 S. E. 904.

27. **Limitation of Liability**.—That a contract limiting the liability of a carrier was not read or explained, and that the contract was signed hurriedly, does not relieve the shipper from its obligations.—Pierson v. Northern Pac. Ry. Co., Wash., 112 Pac. 509.

28. **Chattel Mortgages**—After Acquired Property.—If a mortgage is valid between the parties, it constitutes a lien upon the property against every person, except subsequent purchasers, and creditors acquiring a specific lien upon the property.—Little v. National Bank of Mena, Ark., 133 S. W. 166.

29. **Possession by Mortgagor**.—Though a chattel mortgage is valid on its face, yet, if it permits the mortgagor to remain in possession and dispose of the property in the usual course of business for his own benefit, it is void as to creditors.—Embree v. Roney, Mo., 133 S. W. 83.

30. **Constitutional Law**—Forfeiture of Land Titles.—The provisions for the forfeiture of land titles to the state made by Act Ky. March 15, 1906, c. 22, art. 3, held not to deny equal protection of the laws, because the statute can only meet such conditions as are embraced within the law in a part of the counties in the state.—Kentucky Union Co. v. Commonwealth of Kentucky, 31 Sup. Ct. 171.

31. **Parties Entitled to Raise Question**.—The constitutionality of a statute imposing min-

isterial duties on a ministerial officer cannot ordinarily in the first instance be raised by him in Mandamus to compel him to perform the duties.—Wiles v. Williams, Mo., 133 S. W. 1.

32. **Contempt**—Dismissal.—A party's appeal from a judgment and an order committing him for contempt for failure to comply with the judgment held not to be dismissed nor stayed until he subjects himself to the court's jurisdiction.—Moore v. Moore, 126 N. Y. Supp. 412.

33. **Contracts**—Defaults.—A party to a contract, who waives a default in its terms as to payment, cannot again establish, his right to proceed strictly thereunder, until due notice to the other party.—Walker v. McMurchie Wash., 112 Pac. 500.

34. **Duress**.—Where a check and note alleged to have been obtained by duress are afterwards paid by the plaintiff held, to amount to a ratification.—Brown v. Worthington, Mo., 133 S. W. 93.

35. **Copyrights**—Infringements.—It is no defense to a suit to enjoin infringement of a copyright for a musical composition, that defendant did not knowingly copy complainant's composition, but without knowledge of it independently produced substantially the same thing.—Hein v. Harris, C. C. A., 183 Fed. 107.

36. **Corporations**—Authority of Agent.—A corporation by a uniform course of dealing with the public is estopped from denying that the authority of its agent is different from that which such dealing has apparently shown.—Mosley v. Morgan, Ky., 133 S. W. 226.

37. **Compliance With License Law**.—That plaintiff corporation has not complied with the corporation license law, so as to be entitled to maintain the action, is matter of affirmative defense.—Alaska Salmon Co. v. Standard Box Co., Cal., 112 Pac. 454.

38. **Consolidation**.—Since the statute does not impose upon manufacturing corporations on purchasing the business of a similar corporation any liability to pay the latter's obligations, such liability must result from the terms of the contract of sale.—Ferguson & Wheeler Land, Lumber & Handle Co. v. Good, Ark., 133 S. W. 183.

39. **Right to Purchase Own Stock**.—Where a corporation has power to purchase its own shares, it may buy them on credit.—Mannington v. Hocking Valley Ry. Co., C. C., 183 Fed. 133.

40. **Criminal Law**—Burglary.—In a prosecution for burglary, evidence of possession by one of the coconspirators of fruits of the crime is admissible against defendant.—Bowen v. State, Tex., 133 S. W. 256.

41. **Directed Verdict**.—An exception to a refusal to direct a verdict at the close of plaintiff's case is waived, if defendant thereafter proceeds to put in proof; and the strength of plaintiff's case must then be tested on an examination of the entire record, made upon a new motion to direct a verdict after both sides have rested; and such rule applies in criminal as well as in civil cases.—Leyer v. United States, C. C. A., 183 Fed. 102.

42. **Presumption of Innocence**.—Presumption that one is innocent of an offense charged held not subject to overthrow by presumption that money in stolen pocketbook belonged to owner of book.—State v. Roswell, Mo., 133 S. W. 99.

43.—**Customs and Usages.**—Architects.—One sued for architect's services held entitled to show a general custom to furnish copies of plans and specifications.—*Lowinson v. McKenna*, 126 N. Y. Supp. 604.

44.—**Sale of Standing Timber.**—Standing timber, sold under a contract not providing the method of measurement, held to be measured according to the standard in general use.—*Strickland v. Richardson*, Ga., 69 S. E. 871.

45.—**Damages.**—Excessiveness.—In an action for injuries to a boy 13 years old, a verdict for \$10,000, though excessive, and should be reduced to \$4,000, was not so excessive as to evince passion or prejudice of the jury.—*Forquer v. North*, Mont., 112 Pac. 439.

46.—**Death.**—Contributory Negligence.—In an action for death by electric shock, the court held required to assume that decedent, in picking up an uninsulated wire detached from a pole, did not believe and had no reason to believe that the wire was charged with electricity.—*Foley v. Northern California Power Co.*, Cal., App., 112 Pac. 467.

47.—**Divorce.**—Non-support.—Non-support is not an intolerable indignity sufficient to entitle a wife to divorce when she has enough money to support herself.—*Weller v. Weller*, Mo., 133 S. W. 128.

48.—**Dower.**—Sale of Land.—A widow, having only a claim to dower in land, title to which has passed to infant heirs, cannot have the land sold.—*Conrad v. Crouch*, W. Va., 69 S. E. 888.

49.—**Electricity.**—Injuries.—One using a street, as in the case of a lighting company for stringing wires, is not an absolute insurer that the street shall be as safe after stringing the wires as it was before.—*Pennebaker v. San Joaquin Light & Power Co.*, Cal., 112 Pac. 459.

50.—**Eminent Domain.**—Compensation.—Occupation of street by railroad held not a taking of property of abutting owner who does not own fee in street within constitutional provision requiring compensation before taking for public use.—*McCammon & Lang Lumber Co. v. Trinity & B. V. Ry. Co.*, Tex., 133 S. W. 247.

51.—**Injury to Land Not Taken.**—Just compensation to the owner of a farm, a part of which is taken by the United States by flooding it in improving navigation, demands an award of the damages to that part of the farm not taken by destruction of the easement of access to the turnpike.—*United States v. Grizzard*, 31 Sup. Ct. 162.

52.—**Equity.**—Grounds of Jurisdiction.—The scope of the general principle of equity jurisprudence that, all legal remedies having failed, equity should give a remedy, is that the legal remedy in its nature or character must be inadequate, and the principle does not apply if such remedy is adequate in theory and in law, but, owing to external causes not contemplated by the law, it cannot be enforced.—*Preston v. Sturgis Milling Co.*, C. C. A., 183 Fed. 1.

53.—**Pleading.**—In an equity suit, relief not specifically asked cannot be granted on an answer, in the absence of a prayer for general relief.—*Price v. Price*, W. Va., 69 S. E. 892.

54.—**Estoppel.**—Burden of Proof.—To raise an estoppel, the party setting it up must show certainty to every intent, and facts alleged to constitute it will not be taken by inference or intendment, but must be strictly proved.—*Arkansas Nat. Bank v. Boles*, Ark., 133 S. W. 195.

55.—**Evidence.**—Accommodation Endorsers.—In an action on a note by one claiming to be an accommodation indorser and to have paid the note, parol evidence was competent to show that he signed the note as an accommodation indorser.—*Heaton v. Dickson*, Mo., 133 S. W. 159.

56.—**Executors and Administrators.**—Special Administration.—The appointment of a special administrator is not intended to bring about

general administration, and should not embrace duties involving general administration, in the absence of necessity, nor continue longer than is necessary to appoint an administrator.—*In re Chadbourne's Estate*, Cal., 112 Pac. 472.

57.—**False Imprisonment.**—Acts Constituting.—One who is arrested on a void execution and who gives a bond for jail limits held to continue under restraint.—*Allen v. Fromme*, Sup., 126 N. Y. Supp. 520.

58.—**Evidence.**—In an action for false imprisonment, a telegram announcing plaintiff's arrest pursuant to another telegram held admissible in evidence.—*Taylor Bros. v. Hearn*, Tex., 133 S. W. 301.

59.—**False Pretenses.**—Indictment.—A charge of obtaining by false pretenses, \$36 in money is sustained by evidence that the defendant obtained a check for \$36, on which the money was subsequently paid.—*State v. Jackson*, S. C., 69 S. E. 883.

60.—**Federal Courts.**—Jurisdiction.—The Federal Supreme Court will inquire whether it has jurisdiction of the writ of error, though counsel does not raise the question.—*Fore River Shipbuilding Co. v. Hagg*, 31 Sup. Ct. 185.

61.—**Libel in Government Reservation.**—Circulation in the government reservation of West Point and in the post office in New York City of copies of a newspaper containing a criminal libel printed and published in such city cannot be punished in the federal courts under Act July 7, 1898, providing that offenses committed in places under exclusive jurisdiction of the United States shall be punishable in accordance with the law of the state in which such places are situated.—*United States v. Press Publishing Co.*, 31 Sup. Ct. 212.

62.—**Fraud.**—Burden of Proof.—It is improper to instruct that the burden is on one asserting fraud to establish it by clear and satisfactory evidence.—*Ross v. W. D. Cleveland & Sons*, Tex., 133 S. W. 315.

63.—**Frauds, Statute of.**—Payment of Corporate Debts.—An oral promise by one person to pay the debt of another, given to secure a pecuniary benefit to the promisor, is not within the statute of frauds.—*Hurst Hardware Co. v. Goodman*, W. Va., 69 S. E. 898.

64.—**Guaranty.**—Requisites.—Where a guaranty is merely a proposal, notice of acceptance is necessary, but where it is a direct promise to pay or an original undertaking, notice is unnecessary.—*People's Bank v. Stewart*, Mo., 133 S. W. 70.

65.—**Guardian and Ward.**—Action by Ward.—Checks signed "Special Guardian" are sufficient to put receiver of them upon inquiry.—*Empire State Surety Co. v. Nelson*, 126 N. Y. Supp. 453.

66.—**Homestead.**—Abandonment.—A declaration of a claimant to a homestead as to his intention to return thereto may be proved after claimant's death on the issue of abandonment.—*Keller v. Lindow*, Tex., 133 S. W. 304.

67.—**Homicide.**—Evidence.—In a prosecution for homicide, defendant's conduct surrounding and concerning the debauching of deceased's sister, which was alleged to have been the real cause of the homicide, held admissible.—*Baum v. State*, Tex., 133 S. W. 271.

68.—**Evidence.**—Where on a trial for murder there is no evidence of either lawful or just provocation, the court must in its instructions so inform the jury.—*State v. Tucker*, Mo., 133 S. W. 27.

69.—**Manslaughter.**—One becoming voluntarily too drunk to know what he is about, and then without provocation assaulting and killing another, held guilty of murder in the second degree.—*Henslee v. State*, Ark., 133 S. W. 172.

70.—**Threats.**—In a prosecution for a homicide, the intervening time between threats made by defendant and the homicide do not affect their competency.—*State v. Kretschmar*, Mo., 133 S. W. 16.

71.—**Husband and Wife.**—Bona Fide Purchaser.—Where, in an action against a husband alone on a community debt, his interest in land standing in the name of his wife was attached, a purchaser from the wife pending the attachment without notice thereof held a

bona fide purchaser unaffected by the attachment.—*Anders v. Bouska*, Wash., 112 Pac. 523.

72.—**Community Property.**—Where a wife collected full amount of draft payable to her and her husband, on her indorsement, and they were afterwards divorced, the husband held entitled to only half the amount of draft.—*Barkley v. American Savings Bank & Trust Co.*, Wash., 112 Pac. 495.

73.—**Conveyance by Wife.**—A married woman fraudulently representing herself to be single, and conveying land to a grantee relying on the representation, held estopped from asserting title as against the grantee.—*Keller v. Lindow*, Tex., 133 S. W. 304.

74.—**Injunction.**—Adequacy of Remedy at Law.—Under the statute injunction lies to prevent the doing of a legal wrong when, in the opinion of the court, an adequate remedy cannot be afforded in an action for damages.—*School Dist. No. 3*, Tp. 30, Range 14, *Scott County v. Young*, Mo., 133 S. W. 143.

75.—**Relief.**—Parties, who by their pleadings have asserted only a right to subject to their execution one's interest in land, held not in a position to invoke exercise by the court of any equitable power to subject to payment of their judgment any equitable interest of such person in the land.—*Todd & Hurlef v. Garner*, Tex., 133 S. W. 314.

76.—**Interstate Commerce.**—Regulating Liability of Common Carrier.—Imposition on interstate carrier receiving property for transportation from a point in one state to a point in another of liability to the holder of a bill of lading for loss with the right to recover over against the carrier causing the loss, held a valid regulation of interstate commerce.—*Atlantic Coast Line R. Co. v. Riverside Mills*, 31 Supp. Ct. 164.

77.—**Judgment.**—Joint Liability.—Judgment against a husband for building material furnished on his and the contractor's credit, and used on his wife's property, and against her enforcing the lien, held proper, though the contractor be not a party to the judgment.—*O'Neill Lumber Co. v. Greffet*, Mo., 133 S. W. 113.

78.—**Landlord and Tenant.**—Payment of Rent.—A lessee paying the stipulated rent held not precluded from recovering from the lessor the rental value of property wrongfully withheld by him.—*Goodhue v. Hawkins*, Tex., 133 S. W. 288.

79.—**Larceny.**—What Constitutes.—To constitute larceny, the thing stolen must be the property of another; but either general or special ownership may be sufficient.—*State v. Roswell*, Mo., 133 S. W. 99.

80.—**Liability Insurance.**—Construction of Contract.—The obligation of an insurer in an indemnity policy held not to become fixed until insured has paid the judgment rendered against it for injuries to an employee, so that insured may not recover interest on the judgment from date of its rendition to the date of its affirmation.—*Conqueror Zinc & Lead Co. v. Aetna Life Ins. Co.*, Mo., 133 S. W. 156.

81.—**Waiver of Breach of Warranty.**—Where an indemnity insurer recognized the validity of its policy and by its conduct subjected insured to liability, it could not rely on a breach of insured's warranty.—*Creem v. Fidelity & Casualty Co. of New York*, 126 N. Y. Supp. 555.

82.—**Life Insurance.**—Assignment.—An assignment of a life policy sent to the insurer, not accompanied by the policy, held not a request for change of the beneficiary, within the provisions of the policy.—*Deal v. Deal*, S. C., 69 S. E. 886.

83.—**Cause of Death.**—Where, though insured's confinement at childbirth was followed by puerperal septicaemia, she had begun to recover from that ailment when pneumonia developed, causing her death, it cannot be said that her pregnancy and confinement contributed to her death.—*Thompson v. Royal Neighbors of America*, Mo., 133 S. W. 146.

84.—**Limitation of Actions.**—Loss of Freight.—Even though the failure of a carrier to deliver goods gave the shipper a cause of action within the two years' statute of limitations, limitations held not to begin to run so long as the

carrier promises to search for the goods and deliver them, if found, and if not found, to pay damages.—*Davies v. Texas Cent. R. Co.*, Tex., 133 S. W. 295.

85.—**Livery Stable Keepers.**—Injury to Hired Horse and Vehicle.—In an action by a liveryman against the hirer of a horse and rig for injuries to the animal and rig, evidence held sufficient to require submission to the jury of the question whether the horse was vicious and skittish, which fact was known to plaintiff and not to defendant, and that the horse ran away without negligence on the part of defendant.—*Johnson v. Hyllin*, Tex., 133 S. W. 293.

86.—**Mandamus.**—Remedy at Law.—Remedy at law which will prevent granting of mandamus held required to be equally convenient and effective.—*State ex rel. Riefling v. Sale*, Mo., 133 S. W. 119.

87.—**Master and Servant.**—Anticipation of Dangers.—Defendants held chargeable with notice that the acceleration of the pressure of water in a hose furnished to a boy 13 years old, to be used in wetting down clay, might cause plaintiff's hands to be carried against the knives of a machine and injured.—*Forquer v. North*, Mont., 112 Pac. 439.

88.—**Assumed Risk.**—A servant injured by falling into a pit in the floor, which was in the same condition in which it had been used by himself and under his authority for more than 12 years, held to have assumed the risk.—*Baumann v. Schrupf*, 126 N. Y. Supp. 482.

89.—**Federal Employer's Liability Act.**—Federal employer's liability act held not effective to cure erroneous submission of a claim of negligence not within the petition in an action for injuries to a railroad fireman.—*Missouri, K. & T. Ry. Co. of Texas v. Poole*, Tex., 133 S. W. 239.

90.—**Injuries to Employee.**—A complaint for injury to an employee, caused by an explosion of machinery, held to state a good cause of action, but to limit plaintiff to proof of such negligent acts as caused the explosion.—*Monroe v. Standard Sanitary Mfg. Co.*, Ky., 133 S. W. 214.

91.—**Mechanics' Liens.**—Undisclosed Agency.—The doctrine respecting undisclosed principals applies to mechanic's lien matters.—*O'Neill Lumber Co. v. Greffet*, Mo., Ky., 133 S. W. 214.

92.—**Municipal Corporations.**—Liability for Overflowing Sewers.—Where a city's representatives turned a quantity of water into a sewer to dislodge an obstruction and the water backed up through closet connections and flooded a cellar in which plaintiff's goods were stored, the city was liable for the injuries sustained.—*Hayes v. City of Vancouver*, Wash., 112 Pac. 498.

93.—**Negligence.**—A city held not liable for injuries to a telephone company's cable under the street while removing it in repairing a sewer; the company not having obtained the city's consent to lay the cable under the street and the injury not having been willfully or recklessly done.—*Reynolds County Telephone Co. v. City of Piedmont*, Mo., 133 S. W. 141.

94.—**Negligence.**—Injuries Incident to Business.—The care which the law exacts from one engaged in operating an instrumentality is in proportion to the danger reasonably to be apprehended from its use.—*Foley v. Northern California Power Co.*, Cal., 112 Pac. 467.

95.—**Pleading.**—One suing for negligence must rely on the particular acts of negligence specified in the complaint.—*Foley v. Northern California Power Co.*, Cal., 112 Pac. 467.

96.—**Proximate Cause.**—A defendant's negligence need not be the sole proximate cause of injuries to entitle the injured person to recover against him; he being liable if his negligence concurred with that of another to cause the injuries.—*Parker v. United Rys. Co. of St. Louis*, Mo., 133 S. W. 137.

97.—**New Trial.**—Passion and Prejudice.—A verdict based on the testimony of the witnesses of the defeated party will not be disturbed on the ground that it is the result of passion and prejudice.—*Semple v. United Rys. Co. of St. Louis*, Mo., 133 S. W. 114.

98.—**Partnership.**—Dissolution.—On the dissolution of a partnership and the transfer of the firm business and good will to plaintiff, held, that defendant should be restrained from so-

helling customers of the old firm.—*Kates v. Bok*, 126 N. Y. Supp. 606.

99. **Patents**—Construction.—A patentee who has sufficiently described and distinctly claimed his invention is entitled to every use to which his device can be applied, whether he perceived or was aware of all such uses at the time he secured his patent or not.—*Acme Truck & Tool Co. v. Meredith*, C. C. A., 183 Fed. 124.

100. **Payment**—Dishonored Check.—Delivery of check in payment for goods held not payment, where it was dishonored, and the drawer was not injured by the holder's delay in giving notice of dishonor.—*Williams v. Braun*, Cal., 112 Pac. 465.

101. **Payment by Notes**.—In order that the taking of a note shall operate as a payment of a prior indebtedness, there must be an express agreement to that effect.—*People's Bank v. Stewart*, Mo., 133 S. W. 70.

102. **Pledges**—Nature and Essentials.—A pledge is utterly invalid unless accompanied by actual or constructive possession.—*American Can Co. v. Erie Preserving Co.*, C. C. A., 183 Fed. 96.

103. **Principal and Agent**—Liability of Agent. One who has agreed to purchase chattels for a firm may not make profits by buying the same, and then selling them to the firm at a higher price.—*Farrar v. Kingsley*, 126 N. Y. Supp. 584.

104. **Principal and Surety**—Discharge of Surety.—A paid surety will not be relieved except by a substantial breach, working pecuniary disadvantage to him or depriving him of some protection or privilege reserved in the bond.—*James Black Masonry & Contracting Co. v. National Surety Co.*, Wash., 112 Pac. 517.

105. **Enforcement of Judgment Against Surety**.—Equity will not enjoin collection of execution against surety because creditor is seeking to enforce lien on lands of principal debtor for same debt.—*Post v. W. H. Bailey & Co.*, W. Va., 69 S. E. 910.

106. **Rape**—Detaining Female.—Unlawfully detaining a female with intent to have carnal knowledge of her is a degree of the crime of rape, and it is possible to convict on the testimony of prosecutrix alone.—*Stewart v. Commonwealth*, Ky., 133 S. W. 202.

107. **Removal of Causes**—Separable Controversy.—The question of whether there is a separable controversy so as to authorize the removal of the cause to the federal court, must be determined by the cause of action alleged in the petition.—*State ex rel. Iba v. Mosman*, Mo., 133 S. W. 38.

108. **Sales**—Acceptance.—A buyer cannot be held to have accepted the goods and waived defects by merely unloading or by doing anything else necessary to inspection.—*Building Supply Co. v. Jones*, S. C., 69 S. E. 881.

109. **Sheriffs and Constables**—Excuses for Nonreturn.—The sheriff is not excused from returning an execution by anything short of a showing that its nonreturn resulted from the acts or instructions of the creditor, or was ratified or waived by him.—*Hammons v. Pendleton*, Ark., 133 S. W. 177.

110. **Failure to Levy on Sufficient Goods**.—In an action against a sheriff for failure to levy on sufficient goods to satisfy the judgment, the court, in the absence of proof that the remaining goods of the debtor were worth substantially the balance due on the judgment, could not assume such fact in order to award plaintiff a recovery for such balance.—*Farmers' & Merchants' Bank of Vandalia*, Ill., v. *Maines*, C. C. A., 183 Fed. 37.

111. **Specific Performance**—Contracts Enforceable.—A subscriber to the capital stock of a corporation having fully paid therefor held entitled to compel issuance of a proper certificate for the shares.—*Applegate v. Wellsburg Banking & Trust Co.*, W. Va., 69 S. E. 901.

112. **Where Full Performance Impossible**.—Plaintiff may compel specific performance as to the part of the contract which can be performed, and recover damages for the part which cannot be performed.—*Lackawanna Coal & Iron Co. v. Long*, Mo., 133 S. W. 35.

113. **Street Railroads**—Care Required in Operating Car.—A motorman held authorized to

presume that an adult will not undertake to cross the track in front of an approaching car, and under the humanitarian doctrine he need not stop the car merely because he sees an adult approaching the track.—*Temple v. United Rys. Co. of St. Louis*, Mo., 133 S. W. 114.

114. **Sunday**—Contract for Sunday Labor.—Contract for the publication of advertisements in a Sunday newspaper held to contemplate a performance of labor on Sunday, and hence was void.—Publishers: *Geo. Knapp & Co. v. Culbertson*, Mo., 133 S. W. 55.

115. **Taxation**—School Land.—Certificates of purchase of land which the state anticipates will be given it in lieu of school land held not taxable.—*Slade v. Butte County*, Cal., 112 Pac. 485.

116. **Theaters and Shows**—Dangerous Premises.—The promoters of a street fair held bound to use reasonable care to see that the premises were kept in a safe condition for the use of the guests.—*Murrell v. Smith*, Mo., 133 S. W. 76.

117. **Time**—Construction of Statutory Provisions.—The term "date," as used in a statute requiring an instrument to be dated, means the day, month, and year, and giving the year alone is insufficient.—*In re Price's Estate*, Cal., 112 Pac. 482.

118. **Trade Marks and Trade Names**—Suit for Infringement—Delay in bringing suit for infringement of a trade-mark which would bar the right to recover damages for prior infringement, will not necessarily constitute such laches as to preclude relief in equity against further infringement; the matter being within the discretion of the court, to be exercised in view of the circumstances of the particular case.—*Thomas J. Carroll & Son Co. v. McIlvaine & Baldwin*, C. C. A., 183 Fed. 22.

119. **Words Subject to Appropriation**.—The word "Spearmint," as applied to chewing gum, is a term descriptive of the flavor, open to every manufacturer who uses such flavor, and cannot be appropriated as a trade-mark.—*William Wrigley, Jr., & Co. v. Grove Co.*, C. C. A., 183 Fed. 99.

120. **Trespass**—Trespass to Real Property.—In an action to recover the value of timber cut and removed from land to which it is alleged defendant had no title, the defendant, under the general issue, may defend by showing a survey or patent of the land previous to the plaintiff's title.—*Mosley v. Morgan*, Ky., 133 S. W. 226.

121. **Trespass to Try Title**—Equitable Rights.—A married woman not a party to an action to foreclose a vendor's lien on an undivided half interest in land occupied by herself and husband as a homestead held not bound by the judgment foreclosing the lien on the entire land, and she may sue in trespass to try title.—*Keller v. Lindow*, Tex., 133 S. W. 304.

122. **Trusts**—Spendthrift Trusts.—In Missouri a spendthrift trust may be created limiting the right of alienation and placing the proceeds of the estate beyond seizure by creditors during the life of the cestui que trust.—*Dunephant v. Dickson*, Mo., 133 S. W. 165.

123. **United States**—Eight-hour Law.—Men employed by a contractor for the construction of government jetties in operating and discharging barges loaded with stone held to be seamen, and not laborers or mechanics, within the meaning of the eight-hour law.—*Breakwater Co. v. United States*, C. C. A., 183 Fed. 112.

124. **Vendor and Purchaser**—Enforcement of Lien.—In a suit to enforce a vendor's lien against property subsequently sold by the vendee, where second grantee assumed the debt, the other parties are entitled to a decree requiring payment by him, but not to a personal decree for money.—*Burlew v. Smith*, W. Va., 69 S. E. 908.

125. **Waters and Water Courses**—Water Rents.—For failure to pay a valid claim for willful or unreasonable waste or for fraudulent use of water, the supply may be cut off until the waste is stopped and all arrears paid.—*J. N. Matthews Co. v. City of Buffalo*, 126 N. Y. Supp. 296.